Supreme Court, U.S.
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No. 97-438

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NELLIE HOWARD,

Petitioner,

v.

KATHY ANDERSON, KPMG PEAT MARWICK, and KPMG PEAT MARWICK LLP,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit correctly held that a district court's order staying its own proceedings pending arbitration of the claims underlying the action, pursuant to 9 U.S.C. § 3, but not dismissing that action, is an interlocutory order not subject to immediate appeal.

RULE 29.6 DISCLOSURE

Respondent KPMG Peat Marwick LLP has no parent or subsidiary companies.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
ORDERS BELOW	1
JURISDICTION	2
STATEMENT	2
ARGUMENT	3
I. ALMOST ALL OF PETITIONER'S ARGUMENTS CONCERN ISSUES IRRELEVANT TO THE PETITION AND NOT PROPERLY BEFORE THE COURT.	3
II. CERTIORARI SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT CORRECTLY APPLIED SETTLED LAW IN AN INTERLOCUTORY ORDER THAT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS	3
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:	Page
Altman Nursing, Inc. v. Clay Capital Corp., 84 F.3d 769 (5th Cir. 1996)	6
American Cas. Co. v. L-J, Inc., 35 F.3d 133 (4th Cir. 1994)	6, 8
In re Arbitration Between Chung and President Enters. Corp., 943 F.2d 225 (2d Cir. 1991)	7
Arnold v. Arnold Corp. -- Printed Communications for Business, 920 F.2d 1269 (6th Cir. 1990)	7
Delta Computer Corp. v. Samsung Semiconductor & Telecomm. Co., 879 F.2d 662 (9th Cir. 1989)	7
F.C. Schaffer & Assoc. Inc. v. Demech Contractors, Ltd., 101 F.3d 40 (5th Cir. 1996)	6
Filanto, S.P.A. v. Chilewich Int'l Corp., 984 F.2d 58 (2d Cir. 1993)	3, 6, 8
Gammaro v. Thorp Consumer Discount Co., 15 F.3d 93 (8th Cir. 1994)	6, 8
Humphrey v. Prudential Sec. Inc., 4 F.3d 313 (4th Cir. 1993)	7, 8
McCarthy v. Providential Corp., 94 Civ. 16384, 1997 WL 471876 (9th Cir. Aug. 20, 1997)	6, 8
McDermott Int'l, Inc. v. Underwriters at Lloyds, 981 F.2d 744 (5th Cir. 1993), *cert. denied*, 508 U.S. 951 (1993)	7
Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	8
Norte & Co. v. Defiance Industr., Inc., 319 F.2d 336 (2d Cir. 1963)	3

Cases: **Page**

North River Ins. Co. v. Philadelphia Reins. Corp., 63 F.3d 160 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1289 (1996) 6

Perera v. Siegel Trading Co., 951 F.2d 780 (7th Cir. 1992); 7, 8

Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1993) 4

Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995) 6

S+L+H S.P.A. v. Miller-St. Nazianz, Inc., 988 F.2d 1518 (7th Cir. 1993) 6

Stedor Enters., Ltd. v. Armtex, Inc., 947 F.2d 727 (4th Cir. 1991) 7

Thomas James Assocs., Inc. v. Jameson, 102 F.3d 60 (2d Cir. 1996) 6

Thomson McKinnon Sec. Inc. v. Salter, 873 F.2d 1397 (11th Cir. 1989) 7

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) ... 4, 7

Statutes and Rules:

9 U.S.C. § 3 ..... 2, 4, 5

9 U.S.C. § 16 ..... 4, 5, 6

28 U.S.C. §1292(b) 5, 6

Sup. Ct. Rule 14.1(a) 4

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Kathy Anderson, KPMG Peat Marwick and KPMG Peat Marwick LLP (collectively "KPMG") respectfully request that this Court deny the petition for writ of certiorari filed by Petitioner Nellie Howard seeking review of the June 3, 1997 order of the United States Court of Appeals for the Second Circuit.

ORDERS BELOW

The unreported summary order of the court of appeals is set forth on page 1A of the petition for writ of certiorari. The district court's unreported decision is set forth on page 2A of the petition for writ of certiorari.

JURISDICTION

The order of the court of appeals was entered on June 3, 1997. The petition for writ of certiorari was filed on September 2, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner was hired by KPMG as a senior tax manager in KPMG's New York City office and commenced employment on September 20, 1993. (Pet. App. 3A.) Shortly thereafter, petitioner signed a Senior Manager's Agreement containing a clause providing for arbitration of "[a]ny claim or controversy between the parties arising out of or relating to this Agreement or the breach thereof, or in any way related to the terms and conditions" of petitioner's employment. (*Id.* at 3A-4A.) On or around October 25, 1994, petitioner's employment with KPMG was terminated. (*Id.* at 5A.)

Petitioner filed a complaint in the United States District Court for the Southern District of New York, alleging several causes of action, all of which concerned her employment with KPMG and its termination. (*Id.*) KPMG moved to stay the action pending the arbitration of petitioner's claims pursuant to § 3 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"). (*Id.*) The district court granted KPMG's motion to stay the action pending arbitration of petitioner's claims (the "stay order"). (*Id.* at 18A.)

Petitioner noticed an appeal from the stay order to the United States Court of Appeals for the Second Circuit. The court of appeals, without oral argument, issued an unreported summary order granting KPMG's motion to dismiss the appeal for lack of jurisdiction, denying KPMG's motion for sanctions, and denying petitioner's motion to construe her appeal as a mandamus petition. (Pet. App. 1A.)

ARGUMENT

I. ALMOST ALL OF PETITIONER'S ARGUMENTS CONCERN ISSUES IRRELEVANT TO THE PETITION AND NOT PROPERLY BEFORE THE COURT

Contrary to petitioner's assertion, which consumes virtually all of her petition (Pet. 4-23), her interlocutory petition does not implicate the issue of "the applicability of the FAA to arbitration clauses in employment contracts" (Pet. 11) or, more specifically, the arbitrability of the claims she asserted in the district court. Petitioner asks this Court to review the Second Circuit's order (i) granting respondents' motion to dismiss for lack of jurisdiction petitioner's appeal from the district court's interlocutory stay order, and (ii) denying petitioner's motion to construe her appeal as a mandamus petition. As is clear from the face of this order, the Second Circuit did not affirm, or otherwise treat, the merits of the stay order. *See, e.g., Norte & Co. v. Defiance Indus., Inc.*, 319 F.2d 336, 337 (2d Cir. 1963) ("Since we dismiss this appeal for lack of jurisdiction and find that . . . there is no reason to issue a writ of mandamus, we have no occasion to review on the merits [the district court's] ruling."). Nor does the court of appeals' order preclude timely appellate review of the stay order after the arbitration proceeding concludes and a final judgment is entered. *See Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993). In this posture, the underlying question of the arbitrability of petitioner's claims is not at this juncture properly before this Court.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT CORRECTLY APPLIED SETTLED LAW IN AN INTERLOCUTORY ORDER THAT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS.

The only issue properly presented in the petition is whether a federal court of appeals has appellate jurisdiction to review a district court's stay of its own proceedings pending the

arbitration of the claims underlying the action.[1] All courts considering this issue have properly held that stays pursuant to § 3 of the FAA,[2] are interlocutory and non-appealable. Accordingly, petitioner's challenge to the Second Circuit's dismissal of her appeal is meritless.

Petitioner's principal argument is that *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988), compels classifying an order staying federal proceedings pending arbitration of all the underlying claims as a "final decision" subject to immediate appeal. Significantly, petitioner concedes that no court has accepted her argument regarding *Van Cauwenberghe*. (Pet. 29) ("actions where judicial proceedings are stayed while all claims are sent to arbitration . . . continue to be treated as non-appealable"). This is not surprising because petitioner's argument not only misreads *Van Cauwenberghe,* but also ignores the FAA provision governing the appealability of stays pending arbitration, 9 U.S.C. § 16, and precedent construing that provision.

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[1] Petitioner does not expressly include in her statement of the questions presented the Second Circuit's denial of her motion to construe her appeal as a mandamus petition, nor is this issue fairly included in the questions presented. Thus, this issue is not properly before the Court. See *Sup. Ct. Rule 14.1(a)*; *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1993).

[2] Section 3 of the FAA, provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved is such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

Section 16 of the FAA, which governs appeals from arbitrability determinations, provides, in relevant part:

> (a) An appeal may be taken from --
>
> (1) an order --
>
> (A) refusing a stay of any action under section 3 of [the FAA],
>
> . . .
>
> (3) a *final* decision with respect to an arbitration that is subject to [the FAA].
>
> (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an *interlocutory* order --
>
> (1) granting a stay of any action under section 3 of [the FAA]; . . .

9 U.S.C. § 16 (emphasis added). Section 16(b)(1) clearly prohibits appeals as of right from interlocutory orders granting a stay of a pending action pursuant to § 3 of the FAA -- such as the district court's stay order in this action.[3]

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[3] Petitioner asserts that the legislative history of § 16 supports her interpretation of that provision. (Pet. 25-26.) But the legislative history she cites does not include the language that she attributes to it. Rather, the legislative history supports the Second Circuit's dismissal of petitioner's appeal:

> Subsection (a) of the proposal, in effect, permits an appeal where the effect of the court order favors litigation over arbitration . . . or where a final decision with respect to arbitration is involved. Subsection (b), on the other hand, would not permit an appeal in specified instances in which an interlocutory judicial order favored arbitration over litigation -- *e.g.*, granting a stay of the judicial action, compelling arbitration, or refusing to enjoin an arbitration.

134 Cong. Rec. 31,065 (1988).

Pursuant to § 16 of the FAA, whether an order granting a stay of an action pending arbitration is immediately appealable turns on whether the order is interlocutory or final. In making that determination, the Second Circuit distinguishes between orders issued in "independent" as opposed to "embedded" proceedings. *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 63 F.3d 160, 163 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1289 (1996); *Filanto*, 984 F.2d at 60. If the proceeding is "independent" -- *i.e.*, the plaintiff seeks no relief from the court other than an order compelling or prohibiting arbitration -- then an order compelling arbitration, whether styled a dismissal or a stay, is considered final and is immediately appealable. *North River Ins.*, 63 F.3d at 163; *Filanto*, 984 F.2d at 60. However, if the proceeding is "embedded" -- *e.g.*, a defendant in a pending lawsuit requests that the court compel arbitration of some or all of the claims against it -- then an order compelling arbitration is considered interlocutory and is not immediately appealable, absent certification for interlocutory review pursuant to 28 U.S.C. § 1292(b). *North River Ins.*, 63 F.3d at 163; *Filanto*, 984 F.2d at 60.[4] Other courts of appeals likewise distinguish between "independent" actions and "embedded" actions, and exercise appellate jurisdiction only over appeals from dismissals or stays in independent actions.[5]

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[4] Contrary to petitioner's suggestion (Pet. 26-27), *Thomas James Associates, Inc. v. Jameson*, 102 F.3d 60 (2d Cir. 1996), is not inconsistent with the Second Circuit's order in this action. As petitioner concedes, the issue of appellate jurisdiction was not raised by either party or decided by the Second Circuit in *Thomas James*. (Pet. 27.) Further, in *Thomas James* -- unlike here -- the order appealed from was a dismissal of the complaint in its entirety, not a stay of the action pending arbitration.

[5] *See McCarthy v. Providential Corp.*, 94 Civ. 16384, 1997 WL 471876, at *2-4 (9th Cir. Aug. 20, 1997); *F.C. Schaffer & Assocs. Inc. v. Demech Contractors, Ltd.*, 101 F.3d 40, 41-43 (5th Cir. 1996); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771-72 (5th Cir. 1996); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1301-02 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995); *American Cas. Co. v. L-J, Inc.*, 35 F.3d 133, 135-39 (4th Cir. 1994); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994); *S+L+H S.P.A. v. Miller-St. Nazianz, Inc.*, 988

(Footnote continued)

The Sixth Circuit has not followed this approach of distinguishing between independent and embedded actions. However the result in this action would be the same under the Sixth Circuit's approach. The Sixth Circuit has held that even in an embedded action, an order dismissing -- rather than merely staying -- the action pending arbitration is final and immediately appealable. *See Arnold v. Arnold Corp. -- Printed Communications for Business*, 920 F.2d 1269, 1274-76 (6th Cir. 1990). Under either the majority approach -- which distinguishes between independent and embedded actions -- or the Sixth Circuit's approach -- which distinguishes between stay orders and dismissal orders -- the result is the same in cases like this one where the order stays an action in an embedded proceeding: the order is not subject to immediate appeal. Petitioner does not dispute that this is an embedded action, or that the district court merely stayed, rather than dismissed, her action. Thus, petitioner would have fared no better in the Sixth Circuit, and the disparity of approaches between the Sixth Circuit and the other courts of appeals makes no difference on these facts.

Petitioner places great weight on the *Van Cauwenberghe* definition of "final" to support her claim that the stay order in this action is final. But an order staying an action pending arbitration in an embedded proceeding does not fall within this definition of a "final decision": one that "ends litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe*, 486 U.S. at 521-22. The stay of an embedded proceeding pending arbitration does not

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F.2d 1518, 1522 (7th Cir. 1993); *Humphrey v. Prudential Sec. Inc.*, 4 F.3d 313, 316-19 (4th Cir. 1993); *McDermott Int'l, Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 747-48 (5th Cir.), *cert. denied*, 508 U.S. 951 (1993); *Perera v. Siegel Trading Co.*, 951 F.2d 780, 784-86 (7th Cir. 1992); *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 729-32 (4th Cir. 1991); *In re Arbitration Between Chung and President Enters. Corp.*, 943 F.2d 225, 227-29 (2d Cir. 1991); *Delta Computer Corp. v. Samsung Semiconductor & Telecomm. Co.*, 879 F.2d 662, 664-65 (9th Cir. 1989); *Thomson McKinnon Sec. Inc. v. Salter*, 873 F.2d 1397, 1399 (11th Cir. 1989).

terminate the proceedings in the district court. *See, e.g., American Cas. Co.*, 35 F.3d at 136-39 (stay order in an embedded action does not fall within the definition of "final decision" cited in *Van Cauwenberghe*); *Humphrey*, 4 F.3d at 318 (stay order in embedded action is not final, as "the underlying merits of the claims for relief are not resolved until arbitration is completed"); *Perera*, 951 F.2d at 785-86 (same). Because the claims still must be arbitrated, it cannot be said that the stay order in this action ended "the litigation on the merits." After the arbitration, the action will be reopened on either a motion to confirm or vacate the award in the district court, and that motion will require the district court to do more than merely execute the judgment. Only after the district court has entered judgment on the arbitral award will the litigation be terminated on the merits.

Petitioner rejects as "artificial" the distinction between dismissing an independent action and staying all claims in an embedded action pending arbitration. (Pet. 26-27.) This distinction, however, is justified by the "federal policy favoring arbitration" embodied in the FAA. *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). This "pro-arbitration tilt" requires the party opposing arbitration in an embedded action to "bear the initial consequence of an erroneous district court decision requiring arbitration," *Filanto*, 984 F.2d at 61; *Gammaro*, 15 F.3d at 96, and prevents "the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration." *McCarthy*, 1997 WL 471876, at *4.

In sum, the unreported summary order of the Second Circuit conflicts with no decision of any other court and otherwise raises no issue worthy of certiorari. Thus, there is no reason for this Court to address the questions presented and modify the existing and well-settled principle that orders staying an action pending arbitration in an embedded action are interlocutory orders, and thus, not immediately appealable.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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